REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – EAST LONDON)

Case No: 59/2011
Date Heard: 07/03/11
Order Delivered: 10/03/11
Reasons Available: 16/03/11

In the matter between:

FREEDOM STATIONERY (PTY) LTD First Applicant

AFROPULSE 46 (PTY) t/a
POWER STATIONERY Second Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION, EASTERN CAPE First Respondent

THE SUPERINTENDENT-GENERAL,
DEPARTMENT OF EDUCATION,
EASTERN CAPE GOVERNMENT N.O. Second Respondent

IMPALA STATIONERY (PTY) LTD Third Respondent

PREMIER STATIONERY (PTY) LTD Fourth Respondent

CENTRE FOR CHILD LAW Amicus Curiae

REASONS FOR JUDGMENT

REVELAS J

[1] The applicants sought an urgent interim interdict pending the finalisation of a review application, which was instituted on the same day as this application, challenging two decisions of the first and second respondents. The first decision is the decision sought to

be set aside on review to cancel a tender for the provision of stationery to schools in the Eastern Cape, and the second is the decision to award that tender or part thereof, to the third and fourth respondents. The applicants also seek to set aside any contracts as may have been concluded with these respondents and a directive that the second respondent adjudicate afresh on the tender for the contract concerned, or to advertise the tender afresh.

[2] On 10 March 2011, I granted the urgent interdict in favour of the applicants and made certain costs orders against the first and second respondents. At the hearing I indicted that I would make my reasons for the order granted at a later stage. These are my reasons.

[3] The interim relief sought in this application was for an order interdicting the first and second respondents from concluding any agreements with the third and fourth respondents in respect of or performing in any way, in terms of the tender for contract SCMU6-10-11-0005, until such time as the review is finalised. The urgency of the matter is evident from the allegations contained in the affidavits filed by all the parties before me.

[4] The applicants are confident that the review application could be heard as early as 17 March 2011, during the ordinary motion court and have set shortened time periods in their notice of motion for the dispatch of the record by the first and second respondents and the filing of further affidavits in their application for review which is brought in terms of the provisions of Section 6 (2) (c) and (d); 6 (2) (f) (i) and (ii), and 6 (2) (i) of the Promotion of Administrative Justice Act 3 of 2000. ("PAJA").

[5] The tender in question concerns an agreement for the manufacturing packaging and supply of scholastic stationary for grades R-12 in a large number of schools in the Eastern Cape.

[6] At the onset of the hearing of the application, I granted a request by the Centre for Child Law ("the Centre") to intervene as *amicus curiae* in the matter. The Centre represented by the Legal Resources Centre, elected not to file any affidavits in this matter, but I was given a letter addressed to the State Attorney and to the applicants' attorneys of record, tabling its position. Ms Sarah Sephton of the Legal Resources Centre, the author of the letter, raised the concern that the relief sought made no provision for the scholars affected by the dispute between the parties which raised important constitutional issues.

[7] The affected schools (those which formed the basis for the tender) are 2380 in number, are typically "no fee" schools and are of the poorest schools in the province. The parents of these learners are therefore not likely to provide stationary for their children. According to the Centre, the misfortune of these approximately 688 482 learners is caused by and perpetuated by the litigation under consideration.

[8] The Centre submitted that, should the third and fourth respondents be interdicted from supplying the schools with these materials, the learners will be without stationary for a further three weeks on the applicants' "optimistic view of the time that the review process would take", thus severely prejudicing their right to education which is enshrined in Section 29 of the Constitution.

[9] In this urgent application, the right to education had to be weighed up against the right to fair administrative action, also protected in the Constitution, as well and the provisions of sections 217 (1) of the Constitution which protect those who contract with the Government if the process is not "fair equitable, transparent competitive and costs effective".

[10] The applicants' prospects of success in the review application would have to be strong if their rights were to be given preference to the right of access to education. In determining this question it was necessary to scrutinize the factual background of the alleged violations of both parties' rights, and the applicable principles. These are set out in the following paragraphs.

[11] During 2010, the Department advertised a tender under contract no SCMU6-10-11-005. The closing date for the submission of the tender was 2 September 2010. Both applicants submitted tenders. The contract advertised was for the "manufacture, packaging and supply of scholastic stationary for Grades R-12 to local distribution centres in the Eastern Cape (2010-2011)". The applicants allege that on 1 December 2010 an official of the Department forwarded a recommendation that the tender be awarded *inter alia* to the first and second applicant. The applicants state that a copy of this recommendation is to be discovered by the second respondent.

[12] On 2 December 2010 the second respondent requested the applicants to hold their bids valid in all respects, i.e. by not introducing any escalation in prices for the period 2 December 2010 to 2 February 2011, which request was adhered to and the bids were kept open until 2 February. On 17 December 2010 Mr Mannya of the first respondent notified the first applicant that it, along with five other tenders had received the first respondent's support for the award of a tender in an amount of no less than R42 002 205.13. It later transpired that the third respondent was also part of this group. The fourth respondent was not. A copy of a letter containing this notification is attached to the applicants' papers. A meeting to be held with the group of tenderers on 20 December 2010 was however cancelled.

[13] On 7 January 2011, just before pupils started to get ready to start the new school year, the first applicant wrote to the first respondent to enquire about the progress of the awarding of the contract, based on its understanding that the all processes of the bids in question have been completed by the Department as it had received no instructions yet.

[14] On 11 January 2011 a notice appeared in the news papers cancelling the tender process. Mr Cassim, who deposed to the first applicant's founding affidavit, stated that he received reliable information on 8 February that it was the second respondents intention to award the contract to the third and fourth respondents. (This has in fact occurred since and has been the case since 25 February 2011. Counsel for the first and second respondents informed Hartle J of this development in open court on that day and I was also so advised when the matter came before me).

[15] Through its attorneys, the first applicant, on 8 February 2009 posed the very relevant question to the first respondent, after a period of approximately seven months, why it was not possible for the Department to acquire scholastic stationary by way of the tender process, and why yet it was awarding the contract to the third and fourth respondents, who both belong to the Caxton Group companies while excluding the applicants and three other short-listed suppliers. Reasons for the aforesaid decisions were requested but none were furnished and the urgent proceedings were launched. The second applicant aligned itself with this communication and the entire court application.

[16] The main complaint raised by the applicants against the tender process was its non-adherence to the provisions of section 10 (4) of the Preferential Procurement Policy Framework Act 5, of 2000

and its regulations, which permits for cancellation of a tender only in the following circumstances:

1. If due to changed circumstances there is no longer a need for the goods required.
2. There are no longer funds to cover the total expenditure.
3. No acceptable tenders are received.

[17] The first and second respondents relied on the third ground, that no acceptable tenders were received in their answering affidavit where the first respondent for the first time advised the applicants that they, and other members of the group, were disqualified because they were not in possession valid tax certificates as of 5 January 2011. Their bid was rejected by the second respondent, who said he acted in accordance with the prescripts of Regulation 16 A 9.1 (a) of the Treasury Regulations which were promulgated under the Public Finance Management Act 1 of 1999. A further reason advanced was that because there were no remaining recommended bidders.

[18] The first applicant then made enquiries with the South African Revenue Services who responded that it had withdrawn the first applicant's tax certificate issued on 16 March 2010 because there (a) was a debit balance in respect of PAYE, UIF and SDL and (b) the first applicant's EMP 201 for the period November 2010 was still outstanding. The applicant was able to provide proof that for the period March 2010 it had made a total payment of R463 280.34 in respect of the aforesaid items and therefore there was no debit balance. An official receipt of this payment was issued by SARS and attached to the applicants' papers. The first applicant also attached a copy of its EMP 201 form for the period November 2010 which was duly submitted to, and officially received by SARS. It was therefore

fully tax compliant for the relevant period and a copy of a letter by SARS to that effect was attached to its papers.

[19] It was argued by the applicants that the second respondent had a legal duty to contact the applicants as to the validity of their tax clearance certificate and to allow them to make representations with regard thereto, or alternatively, bring their tax affairs in order before rejecting its bid. Had the second respondent given the first applicant an opportunity to explain itself in accordance with the *audi alteram partem* rule, the first applicant would have proved that it was tax compliant for the relevant period and that its tax certificate had been erroneously withdrawn. That should have effectively disposed of the first and second respondents' complaint that the bid was unacceptable. Consequently, the tender allocation would then not have been made solely in favour of the third and fourth respondents, to the exclusion of the first and second applicants. Accordingly, the applicants' argument continued, the cancellation of the tender was invalid and unlawful.

[20] In *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C), the applicant had been hiring a camping and picnic site from the respondent when the latter decided to put the lease out to tender. The applicant and two other tenderers submitted their tenders and none were accepted. This decision was based on a report regarding the applicant's managing of the site, which was never conveyed to the applicant, as well as a water control officer's report, prepared some two years earlier. Both reports were very critical of the applicant's management of the site. The respondent refused to provide the applicant with its reasons for not accepting his tender. The applicant successfully applied for a review of the respondent's decision. The decision not to accept the applicant's tender was set aside on the basis that it was procedurally unfair, as the applicant (a) had not been informed of the information obtained

by the respondent who relied on it to make an adverse against him, and (b) had not been given an opportunity at least to respond to that information.

[21] In his judgment in *Du Bois,* Griesel J adhered to the *audi alteram partem* doctrine*,* as also expressed in PAJA (Sections 3 (2) (b) (ii) and 3 (3) (b)). The learned judge also deferred at 194 F-H of his judgment to the following passage from Lord Mustill in *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL) at 106 d-h:

> '[5] Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.
> [6] Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer'.

[22] With regard to a person's right to be informed of information adverse to him, the following *dictum* in *Foulds v Minister of Home Affairs and Others* 1996 (4) SA 137 (W), was also relied upon in *Du Bois* at 195 B-C:

> "In these circumstances, and having regard to the provisions of the Act, it was a reasonable and legitimate expectation that the Board, being a body created by the Legislature to consider applications for permanent residence, would properly and fairly consider the applicant's application and give him an opportunity to deal with adverse information obtained by it and with adverse policy considerations insofar as there were no special circumstances or reasons justifying the non-disclosure of such information and policy considerations to him and insofar as they had not already been dealt with by the applicant in his application.
>
> In the circumstances of this case, the Board was obliged to disclose to the applicant adverse information obtained and adverse policy considerations

> and to give the applicant an opportunity to respond thereto. Because of its failure to do so its decision was fatally flawed."

[23] Griesel J at 195 D – 196 C and 193 E-F in *du Bois*, rejected the argument that the *audi* rule is not applicable to tender process because it will make the procedure cumbersome and unmanageable. The learned judge held that the requirements of procedural fairness would depend on the circumstances of each case. That much is provided for in section 3 (2) (a) of PAJA and corresponds with the common law approach.

[24] The SCA also followed the same line of reasoning in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 480 (SCA), where it was held that the tender process constituted 'administrative action' under the Constitution, which entitled a tenderer to a lawful and procedurally fair process, and, where its rights were affected or threatened, to an outcome which was justifiable in relation to the reasons given for it.

[25] In *Logbro,* Mr *Marcus* for the appellant, raised the point (for the first time in the appeal) that the tender committee, before deciding not to award the tender in question, should have given the aggrieved appellant in that case the opportunity to make representations, at least in writing, on the significance of the price increase therein. Cameron JA (as he then was) said the following with regard to that proposition at paragraph [25], 472 B-C:

> "Procedural fairness, in my view, demanded that the committee in reconsidering tenders would afford compliant tenderers an opportunity to make representations at least in writing, on any factor that might lead the committee not to award the tender at all".

[26] In *Metro Projects CC and Another v Klerksdorp Local Municipality and Other* 2004 (1) SA 16 (SCA), the Court at paragraph

[13] referring with approval to the *Logbro* judgment held the following:

> "It may in given circumstances be fair to also a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness".

[27] In *casu,* the applicants should likewise have been given the opportunity to advise the second respondent that they were indeed tax compliant.

[28] The tender process was not only procedurally flawed, but also substantially unfair. The applicants contended that because no competitive tender process was followed in terms of the Preferential Procurement Policy Framework Act, the award of the tender to the third and fourth respondents was as unlawful as the cancellation of the tender, as said earlier, the tender was cancelled because the group of short-listed tenderers were not tax compliant. The third respondent was one of this group of tenderers being considered for the award of the tender which was cancelled. The third respondent was also from the first and second respondents' stated point of view, an unacceptable bidder because it did not have a valid tax clearance certificate. The first and second respondents then appointed the third respondent to perform all or any of the obligations under the tender which was cancelled because of those very income tax transgressions. This decision certainly gave the third respondent an unlawful advantage. The fourth respondent was even disqualified and not short-listed under the cancelled tender. The appointment of the fourth respondent to perform the same obligations as under that cancelled tender, similarly gave the fourth respondent an unlawful advantage. In my view, the awarding of the

tender to the third and the fourth respondents is irrational and unreasonable in relation to the reasons given therefore.

[29] In *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) the court held in paragraph [10], that the basic test for administrative review, was whether the decision reached is one that no reasonable decision-maker could reach; See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at paragraphs [42]-[47] and *Thebe Healthcare v NBC, Road Freight Industry* 2009 (3) SA 187 (WLD).

[30] By cancelling the tender, followed by awarding the contracts in question to the third and fourth respondents in the aforesaid circumstances, the decisions of the first and second respondents clearly flouted the aforesaid principles and fall within the ambit of the provisions of PAJA, from which the applicants' entitlement for relief would emanate.

[31] I will now deal with the case presented by the *amicus*. The case for the Centre, who in effect opposed the relief sought by the applicants, rested on two propositions. The first is that the Court had a duty to consider the interests of the learners in weighing up the rights of the parties to the dispute. Secondly, that the access to scholastic material, such as stationery is a critical part to the right to basic education in terms of Section 29 (1) (a) of the Constitution. Reliance was also placed on to Section 28 (2) of the Constitution which holds that a child's best interests "are of paramount importance in every matter concerning a child".

[32] The intervention of the Centre in this matter was hardly surprising. The Department of Education in the Eastern Cape ("the Department") has virtually ceased all operations. School transport and feeding programmes have been scrapped. Many schools are

without teachers. As is so often the case when a government fails to deliver, the poorest people suffer the most. The collapse of the feeding programmes must have had disastrous consequences for many children, because the meals provided at some schools were often the only meals those children received. This problem not only affects the right to education, but also the right to life, which is one of the primary rights protected in the Constitution.

[33] The protection of access to education is of prime importance with regard to the public interest, and based thereon the Centre urged me to dismiss the applicant's urgent application for an interdict pending the review, or make an order compelling the first and second respondents to appoint either of the competing bidders to deliver stationary to the schools in terms of the contract. To follow those suggestions would unduly benefit some parties at the expense of others. To compel performance by the first and second respondent to appoint either of the competing bidders or a third party to perform in terms of the tender, offends one of the most logical and basic principles in our law, namely that courts should not write contracts for the parties before it. Another solution had to be found.

[34] Trampling on the rights of the applicants is not the only course open to assist with the scholastic needs of the learners. The absence of stationary, transport, and in some cases food, at so many of the schools, is directly attributable to the actions (or inaction) of the Department. It was with a note of irony that I listened to the proposition that the applicants' review and the urgent interdict which it seeks, was the sole cause of the learners' constitutional rights being infringed. The problems that have beset the Department, is of its own making.

[35] Some interim plans, one must assume, would have been made with regard to the food programmes that were cancelled since there have been no court applications that I was aware of, emanating from those dire problems. Similarly, some interim plans could be made with regard to the provision of stationary, at least in some schools. Hopefully charities could be approached for interim assistance in providing stationary. The possibility that stationary stocks may have been left in various departmental depots, should also be explored. The first and second respondent are in the best position to provide information in this regard and to assist with the dissemination of any of the stock left.

[36] To protect the rights of all those involved, was not entirely possible. By granting the urgent interdict sought, the applicants' rights would not be ignored, but the learners would have to wait a while longer for stationary. By burdening the court roll with an expedited date for set down of the hearing of the review, the learners would be spared waiting unduly long for their stationary. The first and second respondents would also then be given the opportunity to award the contracts in question, lawfully.

[37] In the event, the urgent interdict was granted, the date for the hearing of the review was set down to be heard within a week or two and the first and second respondents were ordered to pay the costs of this application.

[38] Since the first respondent was unsuccessful in its opposition at the proceedings on 17 and 25 February 2011, on which days costs were reserved, and there was no reason before me, why costs should not follow the result, the first and second respondents were ordered to pay also the costs incurred on those two days.

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E REVELAS
Judge of the High Court

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